IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~491~~ 18

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
and
THE UNITED STATES OF AMERICA, Intervenor,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANTS OPPOSING MOTIONS TO DISMISS OR AFFIRM

(For List of Attorneys see inside front cover)

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SUBJECT INDEX

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I.

REVIEW BY APPEAL APPROPRIATE

For reply to position taken by appellee (Murray Corporation) opposing review by this Court pursuant to Sec. 1254(2) of Title 28, U. S. C., attention is called to allegations in complaint filed by it in the United States District Court below.

Paragraph seven claims the assessment is made upon or with respect to property constitutionally immune. Paragraph eight claims Michigan laws and local ordinances purporting to authorize such assessment are repugnant to the Constitution of the United States. Paragraph nine claims such laws and ordinances have been applied in a manner which renders them invalid under the Constitution of the United States. (Joint Appendix, p. 6)*

Such allegations provide the framework on which all the issues discussed in the briefs and opinions in this case depend. Even though no specific reference is made to them in the Court of Appeals' opinion, there is passing mention that the United States claimed that the assessment was upon its property and was therefore invalid under the Federal Constitution.

However, affirmance of the judgments in the District Court below in holding these assessments invalid would have the identical legal effect as the final decision in *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110. We quote from opinion of the Court of Appeals sought to be reviewed herein (at pp. 6a and 7a, Jurisdictional Statement) 234 F. 2nd 380, 383, where the decision in Kern-Limerick was characterized as follows:

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*The Murray Complaint was adopted by the United States (Joint Appendix, p. 76).

> "The Arkansas gross receipts tax law was held unconstitutional as applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract entered into with the Navy Department * * *."

By analogy application of the above language to the facts at hand produces the following inevitable result:

The Michigan *ad valorem* property tax law and local ordinances were held unconstitutional as applied to transactions where private contractors were in possession of personal property on hand for processing to be incorporated into aircraft being manufactured for the United States under a cost-plus-fixed-fee prime contract containing partial-payment, title passage clauses on which partial payments had been made prior to effective tax date.

We believe the Courts below thus held Michigan Statutes and local ordinances, as applied to the facts before them, unlawfully interfered with the Federal Constitution. The problem is one of alleged clash between state and federal laws. This is sufficient for appellate jurisdiction of this Court under Sec. 1254(2) 28 U. S. C.

Unlawful interference is a holding of invalidity because of repugnancy. Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction, when in fact holding a state statute invalid because of repugnancy to a federal law—merely by phrasing the opinion in such a way as not to use the exact words of Sec. 1254(2).

> "A statate may be invalid as applied to one state of facts, and yet valid as applied to another."
>
> *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289.

This Court acknowledged jurisdiction by appeal in *Watson v. Employer's Liability Assurance Corporation*, 348 U. S. 66, stating at pp. 69-70:

> "With emphasis on the due process contention, the District Court dismissed the case, holding both statutory provisions unconstitutional as to policies written and delivered outside the State of Louisiana, 197 F. Supp. 494. The Court of Appeals agreed with the District Court and affirmed the dismissal, 202 F. 2nd 407. Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal."

Further this Court took jurisdiction where the Court of Appeals held a state statute ineffective, *Roth v. Delano*, 338 U. S. 226, 228, and has accepted for review without commenting thereon similar determinations striking down official acts taken pursuant to State laws as repugnant to the Federal Constitution or laws. (*New York v. Latrobe*, 279 U. S. 421; *Madden v. Kentucky*, 309 U. S. 83 and *Ott v. Miss. Valley Barge Line Co.*, 336 U. S. 169).

II.

QUESTIONS ARE SUBSTANTIAL

Appellees apparently seek to bar the opportunity sought by appellants City and County for final, authoritative determination of the important questions of intergovernmental immunity presented by this appeal. If upheld, appellees' view would still leave the United States in an uncertain position with regard to its own powers in view of other pending litigation in Michigan and elsewhere. There is still need for full and final decision as indicated by this excerpt from the closing paragraph of Brief filed by the United States in the Court of Appeals (p. 24):

> "This Court is no doubt aware of the importance to the Government of questions such as the validity of its commonly used procurement procedures, the standing of strangers who challenge these procedures, and the immunity of its property from local taxation. This case has, therefore, a significance beyond its monetary aspects. Until an authoritative decision is rendered on such essentially federal questions, the entire process of procurement under the statutes herein discussed will be open to attack, since it cannot be predicted what type of clause or contract will be the next subject of litigation."

Finally, it appears that arguments and authorities in appellee Murray's Motion to Affirm touch on the first and second of the questions raised in this appeal but not the third (Jurisdictional Statement 5, 6). The latter issue was submitted as Question No. 4 in the appellant City's Brief in the Court of Appeals. That Court's opinion did not list it as an issue and summarily disposed of it in a very general manner.

If we assume—for purposes of determining whether anything remains for this Court to review—that said appellee is correct in its position with regard to the first two questions, nevertheless need plainly exists at this time for re-examination and full consideration of judicial landmarks dealing with incidence, direct burden and their effect on constitutional immunity (Jurisdictional Statement 14, 15) to the end that a clear and universally applicable interpretation of *McCullough v. Maryland* can be presented for future guidance of officials at all levels of government.

However, appellants believe that full consideration and argument are urgently needed and should be permitted on all of the important federal issues raised by their appeal.

With respect to motion of the United States to Dismiss or Affirm, appellants submit all its objections have been

fully answered above and particularly at p. 4 by reference to the quotation from the close of Government's Brief in the Court of Appeals and by the Jurisdictional Statement (13-16) heretofore filed.

The position of counsel for the Government moreover is diametrically opposed to grounds in its Jurisdictional Statement just received in Appeal No. 487 entitled *United States and Borg-Warner Corporation v. City of Detroit* in which right of review is claimed under Sec. 1257(2) from determination of Michigan Supreme Court holding a state statute valid where a tax was imposed on lessee of real property owned by the United States.

Arguing that the questions are substantial, counsel for Government there urged at p. 8 of its Jurisdictional Statement:

> "This appeal presents important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Michigan upholding the validity of a local tax which is imposed on a lessee of property belonging to the United States and which is measured by the full value of the property, carries obvious and far-reaching implications. While the precise point in issue has not been, but ought to be, settled by this Court, we believe that fundamental principles regarding the sovereign immunity of the United States, which have received repeated application in the decisions of this Court, compel the conclusion that the tax in question is constitutionally invalid."

Invalidation of this personal property tax by the Court of Appeals ~~likewise~~ presents federal questions which have not been but ought to be settled by this Court and much farther reaching implications than the validation of the tax involved in Appeal 487.

RELIEF

Wherefore, appellants submit that jurisdiction should be noted by the Court and said motions by appellees to dismiss or affirm be denied; or in the alternative, if such appeal is deemed inappropriate that same be considered and allowed as a petition for certiorari herein.

Respectfully submitted,

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